A Brief Look at Affirmative Action

By

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Submitted to the Department of
Anthropology and the Faculty of
The Graduate School of the University
Of Kansas in partial fulfillment of
The requirement for the degree of
Master of Arts

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Date Defended: April 28, 2007

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Date Approved: October 23, 2007

Abstract

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Well over a century of academic anthropology has demonstrated that cultural patterns shape perceptions of subjective events, while the collective sum of individual human experience is itself constitutive of the very stuff of cultural life (Erickson and Dean 2006:1). Anthropology helps us to enlarge the currently held and always too constructing view of humanity (Erickson and Dean 2006:1).

This study is an anthropological investigation into the creation of laws and policies in institutions of higher education. Spanning more than 100 years of court hearings, the United States Supreme court recently ruled on one of the most important issues in society addressing the availability and equal access to institutions of higher learning. I investigate the history of Affirmative Action, the two sides of Affirmative Action, historical case laws, the relationship between anthropology and the law, social science and the law, how the universities are responding to diversity recruitment and commitment initiatives, evaluate current admission demographics in the Kansas City Metropolitan area, and offer anthropological insight into the dangers of diversity campaigns concerning race and ethnicity. The research methods employed are qualitative and quantitative, and include observation, participant observation, informal and formal interviews, and the collection of pertinent literary and statistical documents.

Acknowledgements

I would like to express my sincerest gratitude to Professors Bart Dean and Felix Moos for their intellectual, professional, and personal guidance, and continuous support throughout my intellectual journey, and most importantly, their friendship. I am forever indebted to my best friend, Ricky Yost, for his constant encouragement and support over the years in achieving my dreams. I would like to thank Heather Meiers for her friendship and for standing by me through the many trials and decisions of my educational career and life pursuits. A special thanks to Justin Lamar, for his assistance in the many revisions to this paper, and most importantly for being there through the entire process. I would also like to thank my parents, Jerry and Rose Erickson, and my grandmothers, Alvina Bergren and Dorothy Scott, for instilling in me the virtues of hard work and persistence in life. Thank you to my siblings and their families, and my friends for their friendship, love, advice, support, and encouragement throughout this process. Judy Ross, Carol Archinal, Kathleen Womack and Mike Huffman also deserve more gratitude than I can ever express for keeping me in line and on task.

Lastly, I would like to acknowledge all the irreplaceable bits of knowledge I learned outside the classroom that I will forever carry into the future.

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Introduction

> "Race is deeply entrenched in the cultural landscape of this country—perhaps more than many Americans are willing to admit" (Forsythe 2003:159).

Over the past few years my principal research interest has concerned diversity, concentrating on laws, programs, and initiatives to increase diversity in the Kansas City metropolitan area. Currently, I want to further my understanding of the relationship between diversity and the four law schools geographically closest to the Kansas City metropolitan area: 1) University of Kansas (KU); 2) University of Missouri-Columbia (MU); 3) University of Missouri-Kansas City (UMKC); and 4) Washburn University (Washburn). The central purpose of my research is to commend, promote, and, at the same time, challenge an important development in American culture and education: the "movement to open facilities or institutions of higher education to persons associated with historically disadvantaged groups" (Kennedy 1991:1389). Although the individuals and organizations that constitute this struggle vary considerably in their goals and tactics, they all "march under the banner of what has quickly become a key word in the lexicon of contemporary politics—the word 'diversity'" (Kennedy 1991:1389). Research on this subject is vast, including several disciplines and multidisciplinary publications spanning years of research.

In the past ten years, the Kansas City legal community has attempted to significantly increase diversity in its profession, in many cases beginning with the law schools. The issue of diversity in Kansas City has been moved to the forefront in policy and procedure development, especially since the 2003 U. S. Supreme Court

decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger* regarding the use of race in admission criteria.

The Kansas City Metropolitan Bar Association Diversity Initiative and Committee was created with support from the four law schools working to achieve a more diverse student body. The KCMBA DIC is a group of Kansas City attorneys, university administrators, and other personnel committed to identifying and understanding the barriers in the recruitment and retention process of diverse candidates (Erickson fieldnotes: August 8, 2003).

The National Association for Law Placement ranked Kansas City 3 to 4 percent behind the national average on diversity statistics (The Daily Record 2003: 2A). I investigate the history of Affirmative Action, the two sides of Affirmative Action, historical case law, social science and the law, how the universities are responding to diversity recruitment and commitment initiatives, evaluates current admission demographics, and offer anthropological insight into the dangers of diversity campaigns concerning race and ethnicity. My use of the term "diversity" will be consistent with the Kansas City Metropolitan Bar Association (KCMBA) Diversity Initiative: "the inclusion of members of different races, ethnicities, genders, religions, ages, sexual orientations, nationalities or disabilities" (Kansas City Metropolitan Bar Association 2003).

Ethnographic Strategy, Schedule and Methods

In November, 2004, the Human Subjects Committee-Lawrence approved an extension to continue my research. Literary and statistical collection began in September, 2003, and continued though April of 2005. Data analysis began in late April, 2005. I started my interviews in February, 2004, and finalized in late April, 2005. My writing process began in May, 2005. I defended my thesis research during the spring of 2007.

My project explores how the 2003 Michigan Law School ruling transpired concerning diversity in law schools. I investigate how the ruling has played out in the area law schools that feed metropolitan Kansas City, including Cass, Clay, Jackson, Johnson, Lafayette, Platte, and Ray counties in Missouri, and Johnson and Wyandotte counties in Kansas.

My work is exploratory and ethnographic. I researched admissions offices, established relationships with student associations, and analyzed law school admissions data. The research methods employed are qualitative and quantitative, and included observation, participant observation, informal and formal interviews, and the collection of pertinent literary and statistical documents. I conducted informal interviews, and engaged in observation and participant observation while permanently residing Olathe, Kansas. I also researched literature and statistical data while residing in Olathe, Kansas. Informed consent in ethnographic studies is an ongoing process; it was sought in a variety of contexts and continually negotiated between myself and the interviewee.

Participant Observation and Observation

For 2.5 years I served as the Membership Services Coordinator of the Kansas City Metropolitan Bar Association, managing member services for both Kansas and Missouri. I maintain several contacts in the legal community which I used as points of contact during the interviewing process. In fall 2003, I joined the Kansas City Metropolitan Bar Association as an associate member increasing my networking abilities and interview sources. I currently maintain my membership which provides me additional participant observation opportunities.

I created working relationships with the Student Bar Association representatives at the four law schools, and revitalized my relationship with the Eastern Jackson County Bar Association and the Hispanic Bar Association of Kansas City. The Eastern Jackson County Bar Association is predominantly a minority bar association. Focusing directly on law students, I established relationships with the Asian Law Students Association, Black Law Students Association, and Hispanic American Law Student Association. Forming relationships with law student organizations provided me with observation opportunities. My admissions office interviews, my statistical data, and my observation of law students provided me all angles of perception. Student observation is especially valuable for current information, innuendo, and ad-hoc assessments.

Formal and Informal Interviews

With my interviews I focused on individuals directly involved with recruitment, retention, and attrition processes. I interviewed the Admissions

Directors, Receptionists, and/or Assistant Admissions Directors at all four law schools. Interviews focused on law school recruitment, retention and the commitment to diversity. I took notes during or immediately following multiple semi-structured and open-ended interviews ranging from 20 to 23 minutes in length with each interviewee. I conducted initial interviews over the telephone; I wanted to establish a rapport before interviewing formally face-to-face. Based on my experience with the legal community, I believe this approach to be the most productive for obtaining information.

Final formal interviews were conducted the last week of April 2005. It is my experience that the interviewee is well-versed of his legal rights, and does not need further instruction regarding his rights during the interview. If I provide a formal statement of his rights, I receive many comments regarding my disclosure statement and reduced participation from the interviewee. My second interviews were used to fill in the blanks between what my statistics say and what I already knew from the first interviews.

Some of my main interview questions include the following:

1) How do the law schools differ? How are they similar?
2) How does each law school define diversity? Are their definitions different from that of the Kansas City Metropolitan Bar Association?
3) What efforts are currently employed to recruit students of different ethnicity, race, religion, sexual orientation, age, nationality, disability, and gender, all falling under the category of diversity?
4) From what geographical locations are the law schools recruiting?
5) Are most of the law students residents or non-residents of Kansas and Missouri?

6) Is the law school offering minority scholarships? If so, does it significantly impact the recruiting process, attrition, and retention?
7) What is the ratio of men to women? If enrollment among gender has evened out, why?

Statistical Analysis

I subscribed to the Law School Admissions Council (LSAC) and U. S. News Graduate School Information for increased availability to statistical documentation. I have obtained admissions data reported by the law schools. I will examine enrollment data involving race and ethnicity, gender, and other trends. I will attempt to support statistical trends using my ethnographic data.

I obtained law school applications from all four schools for the 2005-2006 and 2004-2005 school years. I looked at the ethnic and diversity sections of the applications to see the racial/ethnic categories from which to choose. The categories available for selection affect percentages reported in each ethnic and racial group. A given student body may look different depending on what list of categories is available for selection—even though the student body remains the same.

Limitations of This Study

One of the most difficult problems encountered during this study is the availability of pertinent information due to the closed nature of the system being studied and the limited amount of information on this specific topic by anthropologists and the anthropological community.

History of Affirmative Action

In its tumultuous 46-year history, Affirmative Action has been both praised and ridiculed as the answer to racial inequality in the United States. Our nation's progress in reversing the effects of our "long, dark night of slavery and legalized segregation-begun a little over a generation ago- and did not emerge serendipitously" (Shaw 2003). Despite deliberate efforts to address racial inequality, the results have been mixed.

In 1961, President John F. Kennedy first introduced the term “Affirmative Action” as a means of addressing past societal discrimination despite the establishment of civil rights laws and constitutional guarantees (Ethridge 2003). Focusing in particular on education and jobs, Affirmative Action policies required that active measures be taken to ensure that minorities and women enjoy the same opportunities for promotions, salary increases, career advancement, school admissions, scholarships, and financial aid that had been nearly exclusive to whites (Swail, Redd and Perna: 2003). From the onset, Affirmative Action was envisioned as a temporary remedy to discrimination.

Affirmative Action policies were federally managed in response to the *Civil Rights Act of 1964*, and Executive Orders 8802, 10925, and 11246. Such agencies stated that organizations receiving federal funds were required to develop appropriate programs to incorporate women and minorities into mainstream American education and employment opportunities. The Equal Employment Opportunities Commission (1972) was designed to enforce such plans.

The Civil Rights Act of 1964 “prohibits discrimination in a broad array of private conduct including public accommodations, governmental services and education” (Equal Employment Opportunity Commission 2007a). One section of the Act, referred to as Title VII, “prohibits employment discrimination based on race, sex, color, religion and national origin (EEOC 2007a). Additionally, the Act prohibits discrimination in recruitment, hiring, wages, assignments, promotions, benefits, discipline, discharge, layoffs and almost every aspect of employment” (EEOC 2007a).

In another attempt to improve Title VII's effectiveness since its enactment in 1964, Congress amended Title VII by approving the Equal Employment Opportunity Act of 1972 (EEOC 2007a). The report accompanying the bill states, “the time has come for Congress to correct the defects in its own legislation. The promises of equal job opportunity made in 1964 must [now] be made realities" (EEOC 2007a). Accordingly, the 1972 amendments were designed to give the EEOC the authority to "back up" its administrative findings and to increase the jurisdiction and reach of the agency (EEOC 2007a). Congress found that discrimination against minorities and women in the field of education was just as pervasive as discrimination in any other area of employment (EEOC 2007a). All federally funded educational institutions are subject to Title VII.

Extensive case law exists on affirmative action and racial preferences in the United States. However, the following ten cases have had the greatest impact on issues pertaining to education: *1896 Plessy v. Ferguson, 1950 McLaurin v.*

Oklahoma State Regents for Higher Education, 1950 Sweatt v. Painter, 1954 Brown v. Board of Education of Topeka, 1955 Brown v. Board of Education II, 1978 Regents of the University of California v. Bakke, 1996 Hopwood v. Texas, 2000 Smith v. University of Washington Law School, 2003 Grutter v. Bollinger, and 2003 Gratz v. Bollinger (Forsythe 2003; Eckels 2004).

The establishment of racial quotas under the name of Affirmative Action brought charges of so-called reverse discrimination in the late 1970s (Beckwith and Jones 1997). Although the U.S. Supreme Court accepted such an argument in *Regents of the University of California v. Bakke* (1978), it outlawed inflexible numerical based quota systems, which in the *Bakke* case had unfairly discriminated against a white applicant. In the same ruling the Court upheld the legality of Affirmative Action arguing the importance of a diverse group of students benefits the all students (Orfield and Miller 2001). Policy flaws began to show up in the midst of good intentions and reverse discrimination took center stage (Beckwith and Jones 1997).

In the 1980s and early 1990s, the federal government's role in Affirmative Action was considerably diluted providing greater standing to claims of reverse discrimination. The use of minority "set-asides" where past discrimination was unproven and the use of statistics to prove discrimination, in the eyes of the court did not prove intent (Dhami, Squires and Modood 2006). During the 1980s, rollbacks of college civil rights policies caused the minority enrollment to decline (Orfield and Whitla 2001:144).

The *Civil Rights Act of 1991* reaffirmed the federal government's commitment to Affirmative Action amending several points in *Title VII* (Equal Employment Commission 2007b). In the 1996 *Hopwood v Texas* ruling, the courts once again placed limits on the use of race in determining admissions. Fueled by resentment, a public backlash against Affirmative Action began to mount (Brunner 2007). In a country that praised the values of self-reliance and "pulling oneself up by one's bootstraps", some resented the idea that unqualified minorities were getting a free ride on the American education system (Brunner 2007). When advancement involves "*preferential* selection" on the basis of race, gender, or ethnicity or "quotas"—affirmative action generates intense controversy. Even more contentious was the accusation that some minorities enjoyed playing the role of professional victim (Brunner 2007).

Considering that Jim Crow laws and lynching existed well into the '60s, and that myriad subtler forms of racism in housing, employment, and education persisted well beyond the civil rights movement, some impatient for minorities to "get over" the legacy of slavery need to realize that slavery was just the beginning of racism in America (Brunner 2007).

The development, defense, and contestation of preferential affirmative action programs and policies proceeded along two paths. The legal and administrative path included the courts, legislatures, and executive departments of government actions and applications requiring affirmative action (Fullinwider 2006). The other path has been the path of public debate, where the practice of "preferential treatment" has

spawned a vast amount of pro and con literature. All too often, the two paths have failed to adequately connect with the public quarrels and are not always securely anchored in any existing legal basis or practice (Fullinwider 2006).

Affirmative Action debate has experienced two primary spikes of public controversy over approximately the last 35 years. The first spike, a period of passionate debate, began around 1972 and tapered off after 1980. The second spike surfaced in the 1990s leading up to the Supreme Court's decision in the summer of 2003 upholding certain kinds of Affirmative Action (Fullinwider 2006). The first spike encompassed controversy surrounding gender and racial preferences. This is because in the beginning affirmative action was as much about the factory, the firehouse, and the corporate suite as about the university campus. The second spike represents a quarrel about race and ethnicity (Fullinwider 2006). The admissions procedures and practices at selective colleges moved to center stage at the beginning of the twentieth-first century. Women no longer needed a boost but minorities were still unrepresented in most educational facilities (American Bar Association 2005e).

In 2003, the United States Supreme Court ruled on one of the most important cases in the twenty-first century addressing Affirmative Action. The landmark case upheld the University of Michigan's Affirmative Action policies. Two cases, first tried in federal courts in 2000 and 2001, were involved: the University of Michigan's undergraduate program (*Gratz v. Bollinger*) and its law school (*Grutter v. Bollinger*). The Supreme Court (5-4) upheld the University of Michigan Law School's policy, ruling that race can be one of many factors considered by colleges when selecting

their students because it furthers "a compelling interest in obtaining the educational benefits that flow from a diverse student body" (Grutter v. Bollinger 2003). The Supreme Court, however, ruled (6-3) that the more formulaic approach of the University of Michigan's undergraduate admissions program, which uses a point system that rate students and awards additional points to minorities, had to be modified (Gratz v. Bollinger 2003). The undergraduate program, unlike the law schools, did not provide the "individualized consideration" of applicants deemed necessary in previous Supreme Court decisions on Affirmative *Action (Gratz v. Bollinger 2003).*

In the Michigan cases, the Supreme Court ruled that although Affirmative Action was no longer justified as a way of redressing past oppression and injustice, it promoted a "compelling state interest" in diversity at all levels of society (University of Notre Dame 2005). A record number of "friend-of-court" briefs were filed in support of Michigan's Affirmative Action case by hundreds of organizations representing academia, business, corporations, government agencies, labor unions, and the military, arguing the benefits of broad racial representation (University of Notre Dame 2005). As Sandra Day O'Connor wrote for the majority, "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" (University of Michigan 2005). Over the long term, however the challenge is to create an environment in which an individual can perform to his or her full potential and therefore compete for educational opportunities,

promotions and other rewards on merit alone (Cascio 2006). There are now a number of lawsuits and referenda seeking to document the impact of diversity in educational settings (Orfield and Whitla 2001:143).

The debate about Affirmative Action has also grown more murky and difficult as the public has come to appreciate its complexity. The issue of Affirmative Action will once again see the inside of a courtroom if the courts continue to piecemeal the issue focusing on narrow aspects rather than grappling with the whole issue of Affirmative Action and Discrimination (Shields 2002).

Two Sides of Affirmative Action in Education

There is a tendency in the American media to portray the partisans in the Affirmative Action debate as polarized opposites; the fact that there are different definitions and levels of affirmative action in use is rarely, if ever, clearly articulated (Beckwith and Jones 1997). Affirmative Action policies have taken a variety of forms, ranging from simple recruiting efforts in ethnic communities to complex application review and marketing strategies in admissions departments. The various ways Affirmative Action is managed across the country has deepened the abyss separating the two sides of the affirmative action debate.

In the education arena Anti-Affirmative Action proponents argue for admission standards based on "strict merit and individual's rights view" (Shields 2002:733). They argue that the only relevant factors in admissions decisions should be academic credentials such as grade point average, test scores, essays and a few other "clearly delineated soft credentials, which limit the decisions to mostly quantifiable merit based criteria" (Shields 2002: 733; Forsythe 2003: 161).

Pro-affirmative action supporters argue that, although "merit is a central figure in the decision making process, many factors other than academic credentials should be considered when creating a dynamic student body" (Shields 2002:733). Other factors could include: personal and professional motivations, socioeconomic background, bilinguality, interpersonal and communication skills, creativity, willingness to surmount obstacles in completing tasks and the ability to adapt to adversity (Ibarra 1996:26).

Pro-affirmative action supporters also argue that, "race-conscious admissions processes will be necessary as long as prejudice exists in America and under-representation of minority groups persists" (Forsythe 2003: 159). Furthermore, “determining the exact point at which race-conscious admissions programs are no longer necessary in our nation’s academic institutions is nearly an impossible task but with policies in place it provides opportunities for differences to blossom” (Cascio 2006:119; Forsythe 2003:159).

Historical Background on Relative Case Law

The early nineteenth century [1801-1850] brought serious attempts to reform the American college in conformity with the expansion of knowledge and changing social conditions, but the attempts were met with enormous resistance (Gruber 1998:204). The colleges were too poor to restructure even if they had the will to do so, and the business community, which might have supplied some of the necessary funds, saw no relationship between higher education and its own business interests (Gruber 1998:204). College still was viewed as a luxury for a small number of individuals whose needs were met by the traditional liberal arts education. Specialized academic training programs were nonexistent (Gruber 1998:204).

The Civil War and its social and economic consequences had a profound influence upon southern higher education. Colleges that had prospered in the ante-bellum era entered the later years of the 1860s with great apprehension and little cause for optimism (Stetar 1998:248). Endowments had disappeared, students and faculty were in disarray and facilities were often in ruins. The war resulted not only in the closing of colleges but in a complete reversal of the pattern of ante-bellum expansion and prosperity (Stetar 1998: 248). Due to the impoverishing effects of the Civil War and the South's relative cultural isolation from the rest of the nation, changes in higher education evolved at a slower pace than was true elsewhere (Stetar 1998: 249).

The decades from the late 1860's to the turn of the century saw the rise of new universities, the construction of universities on the base of existing colleges, the

founding of centers for professional, technical, and graduate training, and the invasion and profound alteration of the traditional college curriculum (Gruber 1998:203). Most of the nation experienced growth in higher education enrollment in the decades following the War. Multipurpose institutions with programs characteristic of the leading twentieth-century universities began to appear in the East, West and Midwest (Stetar 247). In the spring of 1869, George Lewis Ruffin became the first Negro to graduate from an East Coast American law school (Gellhorn 1968: 107). No such developments were evident in the South where colleges struggled to remain open (Stetar 1998:247).

From the end of Civil war to 1877, Blacks began to experience basic legal citizenship such as the ability to vote, hold office and attend school (Medley 1994:106). Political and economic rights continued to be severely lacking and without the latter; the former proved worthless (Bell 2000: 58).

1896 Plessy v. Ferguson

New Orleans, Louisiana, was one of the more integrated cities in the nineteenth century south. The city desegregated its streetcars in 1867, and started experimenting with integrated public schools in 1869 (Medley 1994: 106). During the years between 1868 and 1896, the city made enormous progress in legalizing interracial marriage, electing black state senators and representatives, integrated juries, public boards, and police departments (Medley 1994:106).

On June 7, 1892, a 30-year-old shoemaker named Homer Plessy was jailed for sitting in the "white" car of the East Louisiana Railroad (Knappman 1994:218).

Homer Plessy was one-eighths black and seven-eighths white, but under Louisiana law, he was considered black and therefore required to sit in the "colored" car (Knappman 1994:218).

Plessy went to court and argued, in *Homer Adolph Plessy v. The State of Louisiana* that the Separate Car Act violated the Thirteenth and Fourteenth Amendments of the United States United States Constitution (Medley 1994:114). John Howard Ferguson, the trial judge, had previously declared the Separate Car Act "unconstitutional on trains traveling though several states" (Medley 1994:114). However, in Plessy's case, he ruled the state could choose to regulate railroad companies that operated exclusively in Louisiana (Knappman 1994:218).

Before Judge Ferguson could issue his final decision, Plessy filed a petition to ask the Louisiana State Supreme Court to stop the judge from making his decision. Plessy argued "that his ancestry was seven-eighths white and only one-eighth African and that he should be treated like any white man" (Birmingham Civil Rights Institute 2006). The Louisiana State Supreme Court asked Judge Ferguson to answer Plessy's petition. Judge Ferguson responded by stating,

> "That [Separate Car Act] does not conflict with the Thirteenth Amendment, which abolished slavery…is too clear for argument…A statute which implies merely a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races. The object of the Fourteenth Amendment was undoubtedly established to enforce the absolute equality of the two races

> before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either" (Ziegler 1958: 50-51).

Judge Ferguson found Homer Plessy guilty of refusing to leave the whites-only car and refusing to admit he was a black man (Birmingham Civil Rights Institute 2006). The Louisiana Supreme Court agreed with Judge Ferguson that the Separate Car Act was constitutional.

Plessy then took his case, *Plessy v. Ferguson*, to the Supreme Court of the United States. Judge John Howard Ferguson was named in the case because he had been named in the petition to the Louisiana State Supreme Court, not because he was a party to the initial lawsuit (ibid 2006). In 1896, the Supreme Court of the United States heard Homer Plessy's case finding him guilty (ibid 2006). Speaking for a seven-person majority, Justice Henry Brown felt the Separate Car Act did not conflict with the Thirteenth or Fourteenth Amendments (ibid 2006).

The 1896 *Plessy v. Ferguson* "separate but equal" doctrine set the tone for the racial status quo and Constitutional justification for a set of racial laws known as Jim Crow in the United States. The "separate but equal" clause stated that “separate facilities for blacks and whites satisfied the Fourteenth Amendment as long as they were equal" (OYEZ 2005a). The "separate but equal" doctrine was quickly extended to cover many areas of public life, such as restaurants, theaters, restrooms, and public schools and universities.

1930s and 1940s

Refusal to admit to public law schools first became an issue in the thirties when it became known that separate Negroes schools were so poor they did not meet even the basic requirements of the “separate but equal” doctrine (Gellhorn 1968:107). The awareness brought further changes at American universities. The University of Missouri’s practice of excluding Negroes and providing them financial aid to attend out-of-state schools was voided (Gellhorn 1968:108).

In 1936, the University of Maryland was ordered to admit Negroes on a nondiscriminatory basis and began to do so in a tiny trickle (Gellhorn 1968:107). Among the graduates was Thurgood Marshall, the first African American to serve on the United States Supreme Court (Finkelman 1192:xiii). Howard Law School, under the direction of Charles Hamilton Houston, became the training ground for a select group of black lawyers who would begin to revolutionize American law though civil rights suits and high-quality legal services for Southern blacks (Finkelman 1992:xiii).

In the 1940s, Arkansas was the first state to conclude, "It was financially impractical to maintain a separate Negro Law School of equal quality, and so became the first law school in the Old south to admit Negroes" (Gellhorn 1968:108). Unfortunately, only a few students enrolled. Further lawsuits at the close of the forties and the early fifties forced public law schools in six other Southern states to drop their exclusionary racial practices. Even after constitutional support for the removal of racial barriers, outright discrimination did not disappear. In fact, one-third of all Southern schools were still refusing Negro applicants’ two years later (Gellhorn

1969:107). Several public schools did not open their doors on a nondiscriminatory basis until threatened by litigation, and still the vast vestiges of admittedly discriminatory entrance standards remained intact at most private Southern school until the 1970s.

Law school practices mirrored the profession's customs and society's standards of the time. White law firms, government, business and bar associations were closed to the Negro lawyer, forcing him to operate on the fringe of the profession (Gellhorn 1968:108). The "separate but equal" doctrine stood almost unchallenged for nearly fifty years, until a series of decisions questioning the constitutionality of segregation in institutions of higher learning.

1950 McLaurin v. Oklahoma State Regents for Higher Education

A slightly different segregation case was *McLaurin v. Oklahoma State Regents*. In this case, we are faced with the question whether "a state may, after admitting a student to graduate instruction at a state university, afford him different treatment from other students solely because of his race" (McLaurin v. Oklahoma State Regents 1950).

G.W. McLaurin, a black citizen of the state of Oklahoma, applied for admission to the University of Oklahoma with the desire to earn a Doctorate in Education. His application was initially denied solely on his race. In 1950, school authorities were required to exclude McLaurin based on current Oklahoma statues stating it was a "misdemeanor to maintain, operate, teach, or attend a school at which both whites and Negros are enrolled and taught collectively" (McLaurin v. Oklahoma

State Regents 1950). The University of Oklahoma later admitted McLaurin, because other local black universities did not offer comparable graduate programs and the state had a constitutional duty to provide all students with equal educational opportunities.

McLaurin's admission to the University of Oklahoma started the campaign to revise Oklahoma statutes to permit the admission of Negros to white institutions of higher learning when Negro schools did not offer comparable courses or programs (Higginbotham 1992:1005). In such situations, the program of instruction "shall be provided to the student at another college or institution of higher education upon a segregated basis where the program or course of study is available" (McLaurin v. Oklahoma State Regents 1950). One the student was formally admitted to the program the University President had the ability to determine the extent particular segregation rules and regulations were applied.

McLaurin was required to sit in a designated desk in an adjoining classroom apart from his fellow classmates; to sit at a designated desk on another floor of the library; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria (Higginbotham 1992:1005). McLaurin argued that this policy was "unconstitutional and impaired and inhibited his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession" (McLaurin v. Oklahoma State Regents 1950).

A handful of school officials argued, that McLaurin would be in no better position with these restrictions removed, since he still might be set apart from fellow

students (Higginbotham 1992:1008). The vast difference between the two sides is the Constitutional difference: restrictions imposed by the state prohibiting the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such interference (Higginbotham 1992:1008). Removing state restrictions will not necessarily abate individual and group predilections, prejudices and choices, but at the very least, the state will not be depriving individuals the opportunity to secure acceptance by his fellow classmates on his own merits (McLaurin v. Oklahoma State Regents 1950).

. In 1950, the Supreme Court agreed in a unanimous decision, that the current conditions under which G.W. McLaurin was required to receive his education deprived him of his personal and present rights to equal protection under the law (McLaurin v. Oklahoma State Regents 1950).

1950s Sweatt v. Painter

Until the 1950 landmark case, *Sweatt v. Painter*, black students were systematically excluded from law schools solely on race (Finkelman 1992:xiii; Forsythe 2003:162). In 1946, Herman Sweatt, a black student, desired to attend the University of Texas Law School. At this time, state law restricted access to the university to whites resulting in the denial of his application on the bases of his race (Sweatt v. Painter 1950). The University of Texas had established a separate law school for blacks and other colored students. Sweatt argued that the two schools were not equal: the minority school was smaller and did not have as good of a reputation since it was newer (Sweatt v. Painter 1950).

In 1950, the Supreme Court determined that separate law school facilities were not equal under the Equal Protection Clause of the Fourteenth Amendment and forced the University of Texas Law School to admit him (Kennedy 1992: 1395). Speaking for a unanimous Court in *Sweatt v. Painter*, Chief Justice Vinson wrote, "with such a substantial and significant segment of society excluded, we cannot conclude that the education offered [Mr. Sweatt] is substantially equal to that which he would receive if he were admitted to the University of Texas Law school" (Fine 1973:212).

The Court also found that the "law school for Negroes," which was to have opened in 1947, would have been grossly unequal to the University of Texas Law School (Forsythe 2003:163). The Court argued that the separate school would be inferior in a number of areas, including faculty, course variety, library facilities, legal writing opportunities, and overall prestige (Forsythe 2003:162). The Court concluded "that the mere separation from the majority of law students harmed students' abilities to compete in the legal arena" (ibid)

McLaurin and *Sweatt* contributed and set the support framework for the infamous *Brown* decision by providing an early precedent saying that "separate but equal" was not necessarily true in education (Bowen and Bok 1998). They also provided a different interpretation of the Fourteenth Amendment to the Constitution than the one used in *Plessy v. Ferguson*, which served as the precedent until these decisions (Bowen and Bok 1998). In *Plessy*, the Court ruled that the Fourteenth Amendment did not require "social comingleing of the races;" in *McLaurin*, it ruled

that isolating McLaurin from the rest of the student body because of race denied him equal protection of the law and therefore violated the Fourteenth Amendment (Bowen and Bok 1998). *Sweatt* took into account both tangible and intangible inequalities between the white and black law schools; *Plessy* did not consider the intangible factors (Bowen and Bok 1998). By providing a newer interpretation of the Fourteenth Amendment than that of Plessy, *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents for Higher Education* paved the way for later Supreme Court decisions on desegregation of public schools (Bowen and Bok 1998).

1954 Brown v. Board of Education of Topeka

In the early 1950's, racial segregation in public schools was the norm across America. All school in a school district were supposed to be equal, most black schools were distantly inferior to their white counterparts. In Topeka, Kansas, a black third-grader named Linda Brown had to walk one mile through a railroad switchyard to get to her black elementary school, even though a white elementary school was only seven blocks away (Knappman 1994:467). Linda's father, Oliver Brown, tried to enroll her in the white elementary school, but the principal of the school refused (Knappman 1994:467). Brown went to McKinley Burnett, the head of Topeka's branch of the National Association for the Advancement of Colored People (NAACP) and asked for help (Knappman 1994:467). The NAACP eagerly assisted the Browns, as it had long wanted to challenge segregation in public schools (Knappman 1994:467). With Brown's complaint, it had "the right plaintiff at the right time" (Knappman 1994:467). Other black parents joined Brown, and, in 1951, the NAACP

requested an injunction that would forbid the segregation of Topeka's public schools (Knappman 1994:467).

The U.S. District Court for the District of Kansas heard Brown's case in June 1951. At the trial, the NAACP argued that segregated schools sent the message to black children that they were inferior to whites; therefore, the schools were inherently unequal (Knappman 1994:467). The Board of Education's defense was that, because segregation in Topeka and elsewhere pervaded many other aspects of life, segregated schools simply prepared black children for the segregation they would face during adulthood (Bowen and Bok 1998:94). The board also argued that segregated schools were not necessarily harmful to black children; great African Americans such as Frederick Douglass, Booker T. Washington, and George Washington Carver had overcome more than just segregated schools to achieve what they achieved (Knappman 1994:467-468). The request for an injunction put the court in a difficult decision.

On the one hand, the judges agreed “segregation of white and colored children in public schools has a detrimental effect upon the colored children...A sense of inferiority affects the motivation of a child to learn (Knappman 1994:468). On the other hand, the precedent of *Plessy v Ferguson* allowed separate but equal school systems for blacks and whites, and no Supreme Court ruling had completely overturned *Plessy* yet. Because of the precedent of *Plessy*, the court felt "compelled" to rule in favor of the Board of Education (Ziegler 1958:78). Brown and the NAACP appealed to the Supreme Court on October 1, 1951 combining their case with other

cases that challenged school segregation in South Carolina, Virginia, and Delaware (Ziegler 1958:78). The Supreme Court first heard the case on December 9, 1952, but failed to reach a decision (Ziegler 1958:78). In the 1953 argument, the Court requested that both sides discuss "the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" (Ziegler 1958: 76). The argument shed very little additional light on the issue. The Court had to make its decision based not on whether or not the authors of the Fourteenth Amendment had desegregated schools in mind when they wrote the amendment in 1868, but based on whether or not desegregated schools deprived black children of equal protection of the law in 1954 (Ziegler 1958: 78). On May 17, 1954, Chief Justice Earl Warren read the decision of the unanimous Court,

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does...We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment (Ziegler 1958: 78-79).

The Supreme Court struck down the "separate but equal" doctrine of *Plessy* for public education, ruled in favor of the plaintiffs, and required the desegregation of schools across America (Ziegler 1958: 79).

The Supreme Court's *Brown v. Board of Education of Topeka* decision did not abolish segregation in other public areas, such as restaurants and restrooms, nor did it require desegregation of public schools by a specific time (Huston 1954). It did, however declare the permissive or mandatory segregation that existed in 21 states unconstitutional (Huston 1954). It was an enormous step towards complete desegregation in public schools.

1955 Brown v. Board of Education II

The Court held that the problems identified in *Brown v. Board of Education of Topeka* required varied local solutions. Chief Justice Warren conferred much responsibility on local school authorities and the local courts that originally heard the school segregation cases (Bell 2000:164). They were to implement the principles embraced by the Supreme Court in the first Brown decision. Chief Justice Warren urged localities to act on the new principles promptly and to move toward full compliance "with all deliberate speed" (OYEZ 2005b, Bell 2000:164).

Some areas readily embraced integration after *Brown*, while others submitted only after further prodding from the courts. School administrators quickly realized that they faced many problems, such as increased violence and increased disparity in the abilities of students in the same classroom (Bell 2000:165). Also, because of de facto segregation, many Northern school districts had to resort to busing as a means of achieving integration, which resulted in heightened racial tensions (Bell 2000:165). Yet despite its problems, integration of the public schools of America was an important step towards equality among all the races.

Late 1950s, 1960s, and 1970s

The Civil Rights Movement was at a peak from 1955-1965. Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, guaranteeing basic civil rights for all Americans, regardless of race, after nearly a decade of nonviolent protests and marches, ranging from the 1955-1956 Montgomery bus boycott to the student-led sit-ins of the 1960s to the huge March on Washington in 1963. In the late l960s select universities decided to undertake systematic efforts to increase their minority enrollments, often spurred by the social upheaval of urban riots, student protests, federal policy, and the assassination of Martin Luther King Jr. (Orfield and Whitla 2001:145).

Normal recruitment and selection systems did not produce a significant number of minority enrollments, and many universities went through the peak of the civil rights era with very few minority students (Orfield and Whitla 2001:145). Even highly selective colleges and professional schools tended to have very small numbers of minority students until the late l960s and early 1970s (Orfield and Whitla 2001:144). In the 19 states with historically separate black public universities, real integration often did not begin until the l970s (Orfield and Whitla 2001:173).

Vast changes have occurred in the level of access to college for minority students since the 1960s, with encouraging trends throughout the next 10 years (Orfield and Whitla 2001:144). Professional education experienced substantial changes. Law school enrollment grew from 1 percent black in l960 to 7.5 percent in l995 (Orfield and Whitla 2001:144). A significant change especially since for most

of the twentieth century blacks made up less than 1 percent of all American lawyers (Finkelman 1992: vii). Often the percentage of black lawyers was far below that figure in many parts of the United States (Finkelman 1992: vii).

In the early 1970s, the Supreme Court began to turn its attention from schools in the South to those in the North. The justices soon discovered that achieving desegregation in these schools would require different tactics (Lukas 1985). In the South, blacks and whites had lived in close proximity to each other for hundreds of years; therefore, desegregation was simply a matter of assigning students to the school closest to their home (Lukus 1985:299-300). This strategy did not work in the North because of segregated housing patterns. Once again the Court approved the utilization of measures that were “administratively awkward, inconvenient for families, and in some cases even bizarre" in an attempt to achieve more educational integration (Lukas 1985: 233).

1978 Regents Of The University Of California v. Bakke

For more than two decades the legal foundation for policies permitting the integration and admission policies of highly selective universities and professional schools rested on the Supreme Court's 1978 *Bakke* decision (Orfield and Whitla 2001:143).

Allan Bakke, a thirty-five-year-old white man, applied for admission to the University of California Medical School at Davis on two separate occasions. He was rejected both times. At the time Bakke applied to Medical School, the school reserved 16 seats in each entering class of 100 students for "qualified" minorities

(Regents of the University of California v. Bakke 1978). The seat selection method was part of the university's affirmative action program attempting to address the longstanding and unfair minority exclusion from the medical profession (Oyez 2006b; Bell 2000). Bakke's qualifications (college GPA and test scores) exceeded those of any of the minority students admitted in the two years his application was rejected (Regents of the University of California v. Bakke 1978). Bakke contended, first in the California courts, then in the Supreme Court, that his application was denied both times solely based on race (Oyez 2006b).

Did the University of California violate the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964, through the use of their affirmative action policies that resulted in the repeated rejection of Bakke's medical school application? In the Bakke decision, there was no single majority opinion (Oyez 2006b). Four of the justices contended that any racial quota system supported by the government violated the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment (Oyez 2006b). The remaining four justices held that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible (Oyez 2006b).

Justice Lewis Powell, Jr., issued the controlling opinion and upheld race-conscious admissions policies as a viable criteria in the admissions process on the grounds that they support the important goal of producing a diverse student body representing many experiences and points of view to enrich the discussions and learning experiences on campus" (Orfield and Whitla 2001:143). While the value and

importance of this goal seemed obvious to many within the university and academic community, little had been done to demonstrate how diversity worked on college campuses or detail any concrete examples of the contributions it had provided (Orfield and Whitla 2001:143). However, in his opinion, Powell argued that the rigid numerical racial quotas employed at the school during the time that Bakke applied for admission violated the Equal Protection Clause of the Fourteenth Amendment and ordered the University admit Bakke to the medical school (Orfield and Whitla 2001:145).

1996 Hopwood v Texas

Hopwood v. Texas ignited major controversy surrounding University and College admission practices across the country. The case began in 1992, when named Cheryl Hopwood, a white woman, was denied admission to the University of Texas Law School despite better academic qualifications than many of the minority students admitted that same year (Orfield and Miller 1998:51). In theory, Cheryl Hopwood was the "perfect plaintiff to question the fairness of reverse discrimination" because of her academic credentials and the personal hardships she had endured and overcome (Burka 1999).

In 1996, after discussion on several judiciary levels the Fifth Circuit Court of Appeals ruled in favor of Ms. Hopwood (Orfield and Miller 1998:56). The Supreme Court declined to review the case, effectively banning affirmative action in Texas, Louisiana, and Mississippi under the jurisdiction of the Fifth Circuit Court of Appeals (Center for Individual Rights 2006a; Orfield and Miller 1998:56). The legal

principle put forth by the Court of Appeals was simple: the 14th Amendment forbids universities from using race as a factor in admissions (Center for Individual Rights 2006b; Orfield and Miller 1998:56). In a statement issued by the court, "it was irrational to believe that achieving diversity actually brought students to campus with different perspective and experiences: The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon physical size or blood type applicants and that there is no rational basis to predict that minority students bring different views or perspectives to campus" (Orfield 2001:13). Yet one of the most consistent finding in social science research and government statistics and reports in the United States is that race does make a difference and the differences are often profound (Orfield and Miller 2001: 13) The Hopwood court concluded that Texas had fulfilled its obligations to remedy a history of overt discrimination and that it was neither necessary nor permissible to continue racially targeted efforts to raise minority enrollment in the state's public universities (Orfield and Miller 1998:51).

Colleges and universities scrambled to defend their use of race in admissions procedures or quietly redesign their admission programs to avoid public inquiry and additional scrutiny from both sides of Affirmative Action debate (Orfield 2001:4-5).

2000 Smith v University of Washington Law School

Katuria Smith, Angela Rock and Michael Pyle v. University of Washington Law School (UW) is one of a three-pronged attack on affirmative action that began in 1997. All three applications were denied admission under a system that gave

preference to certain groups over another based on race (Hentoff 1998). A lawsuit was filed against the Law School alleging illegal discrimination against Caucasians and others on the basis of race resulting in the denial of their law school applications (Smith v. University of Washington 2000).

During the years in question, the University of Washington Law School introduced a rigorous set of preferences intended to increase minority enrollment. From at least 1994 to 1998, the Law School used race as a criterion in its admissions process ensuring the enrollment of a diverse student body (Smith v University of Washington 2000). In 1994, the year Smith was rejected, the minority preference was in place. The school meet their goal increasing diversity from 17% in 1989 to 43% that year (Blummer 1998; Hentoff 1998). The diversity program, as the University would later admit, involved lowering the bar for minority applicants, and someone with Katuria Smith's qualifications would have been immediately placed on the acceptance list if she had not been white (Blummer 1998; Hentoff 1998).

Katuria Smith was born to a 17-year-old mother, reared in poverty, and dropped out of high school. Her parents divorced when Smith was 11, she lived "hand to mouth" and worked wherever she could get work to get out of poverty (Malkin 1997). At the age of 21 Smith enrolled in night classes at a community college paralegal program. Holding down jobs during the day, she graduated and enrolled in the University of Washington, where she earned a business degree in 1994 (Malkin 1997). With her 3.65 GPA and LSAT score of 165 (94th percentile), she

fully expected to be admitted to the University of Washington Law School. Instead, she was rejected with no chance to appeal (Malkin 1997; Foster and Schubert 1998).

Angela Rock, a 1995 in-state UW undergraduate alumnus, joined Smith in her suit (Malkin 1997). Rock was rejected from Washington but, on the merit of her 3.65 GPA and 165 LSAT, was immediately accepted by Vanderbilt, Georgetown, UCLA, and the University of Colorado (Malkin 1997). The third plaintiff, Michael Pyle earned a 3.15 GPA at Duke and scored a 168 (97th percentile) on his LSAT (Malkin 1997; Foster and Schubert 1998). Both Rock and Pyle fully expected to be admitted to the University of Washington School of Law too.

In 1997, the Washington Policy Center pushed for an initiative to end racial preferences in the state of Washington. The ballot mirrored the successful California Civil Rights Initiative (Proposition 209) of 1996 (Hirschman 2006). The Washington Initiative, I-200, was approved by 58% of the state's voters in 1998 (Bronner 1998; Feigenbaum 1999). Overnight, affirmative action became illegal in the State of Washington. UW was forced to alter its admissions policy and dismantle its system of racial preferences (Bronner 1998; Feigenbaum 1999).

Since the passage of I-200, the University of Washington has turned to other methods of encouraging minorities to enroll, while continuing to defend its abandoned system. The University argued its case before the Ninth Circuit U.S. Court of Appeals and on December 4, 2000, the court ruled that race could be used as one of many factors in admissions to achieve an intellectually diverse student body.

The decision had no bearing on the law in Washington State, but it allowed Smith to appeal to the Supreme Court (Coyle 2001; Levey 2001).

The appeal filed on behalf of Smith, Rock, and Pyle asked the Supreme Court to rule on whether diversity was a compelling interest that could justify racial preferences. On May 29, 2001, the Supreme Court declined to hear the case. Thus, the 1978 Bakke decision, remained the most recent High Court ruling on affirmative action (Coyle 2001; Levey 2001).

2003 Grutter v. Bollinger and 2003 Gratz v. Bollinger

In 1997, the Center for Individual Rights filed two lawsuits against the University of Michigan challenging its use of racial preferences in admission policies. One lawsuit aimed at University of Michigan undergraduate admissions program (Gratz v. Bollinger 2003). The second challenged the University of Michigan law school admissions system (Grutter v. Bollinger 2003). Grutter and Gratz are the most recent efforts to end the use of racially preferential admission systems. Though these systems take many forms, they share the same fundamental characteristics, the use of largely separate admissions standards for preferred racial groups in order to boost the number of targeted students (CIR 2006b).

Jennifer Gratz and Patrick Hamacher both applied for admissions to the University of Michigan's College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both applicants are Caucasian (Gratz v. Bollinger 2003). In 1995, Gratz applied for fall admission with a GPA of 3.8 and ACT score of 25. She was denied early admission delaying her final decision until April (Gratz v.

Bollinger 2003). The university stated that, “although Gratz was “well qualified, she was less competitive than the students who had been admitted on first review” (Gratz v. Bollinger 2003). Gratz was notified in April that LSA was unable to offer her admission (Gratz v. Bollinger 2003). She enrolled at he University of Michigan at Dearborn (OYEZ 2006a; Gratz v. Bollinger 2003).

Patrick Hamacher applied for admission to the LSA for the fall of 1997 with an adjusted GPA of 3.0, and an ACT score of 28 (Gratz v. Bollinger 2003). A final admissions decision was also postponed because, though his “academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission” (Gratz v. Bollinger 2003). 1n April 1997, Hamacher’s application was denied and he enrolled at Michigan State University (Gratz v. Bollinger 2003).

In 1997, Barbara Grutter, a white resident of Michigan, applied for admission to the University of Michigan Law School (Grutter v Bollinger 2003). Grutter applied with a 3.8 undergraduate GPA and an LSAT score of 161 (Randell 2006). She was waitlisted and ultimately denied admission to the University of Michigan Law School for the 1996-97 admission cycle (Randall 2006). Grutter became the lead plaintiff after state legislators opposing affirmative action collected a list of 100 potential plaintiffs for a "reverse discrimination" challenge (Randall 2006). The Law School admits that during the years that Barbara Grutter applied for law school “race was used as factor in making admissions decisions because it serves “a compelling interest in achieving diversity among its student body" (Grutter v Bollinger 2003).

The University of Michigan argued, first that racial diversity is a compelling state interest that justifies an exception to the 14th Amendment and, second, that dual admissions standards are the only practical means to achieving racial diversity while maintaining high academic standards (CIR 2000b).

In both Gratz and Grutter, the Supreme Court addressed the question of whether "the University of Michigan's use of racial preferences in student admissions violate the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964" (Gratz v Bollinger 2003; Grutter v. Bollinger 2003). In Gratz the Michigan Supreme Court ruled,

> "Yes. In a 6-3 opinion delivered by Chief Justice William H. Rehnquist, the Court held that the University of Michigan's use of racial preferences in undergraduate admissions violates both the Equal Protection Clause and Title VI. While rejecting the argument that diversity cannot constitute a compelling state interest, the Court reasoned that the automatic distribution of 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race was not narrowly tailored and did not provide the individualized consideration Justice Powell contemplated in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Chief Justice Rehnquist wrote, "because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause"' (Gratz v. Bollinger 2003).

Where as in the Grutter case the Michigan Supreme Court stated,

> "No. In a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a

> diverse student body. The Court reasoned that, because the Law School conducts highly individualized review of each applicant, no acceptance or rejection is based automatically on a variable such as race and that this process ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Justice O'Connor wrote, "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm no minority applicants" (Grutter v. Bollinger 2003).

The Court's rulings in Gratz and Grutter did not completely eliminate the use of racial preferences to achieve diversity. Instead, it eliminated only the more mechanical preferences used by Michigan's undergraduate college, while permitting the UM law school system, which purportedly considered race on an individualized basis to stand. In Grutter, the Court also held for the first time that "diversity" is a compelling interest that justifies the use of racial classifications (Grutter v Bollinger 2003). Unfortunately, Grutter did not provide a means to distinguish between legitimate interests in including many perspectives in order to improve classroom discussion verses the entirely illegitimate institutional interest in simple racial balancing (CIR 2000b).

The Court held that even if a school meets the conditions for taking race into account, its procedures must consider other, non-racial ways a student might contribute to educational diversity. Moreover, a school must assess the value of racial and other kinds of "diversity" on a case-by-case, individualized basis. Finally, the Court suggested a time limit for any consideration of race (25 years) and required schools to periodically review the continued need for explicit racial preferences in light of improvements in minority educational achievement. While the Court did not

end the use of race in admissions, it made racial preferences marginally more risky, expensive, and awkward to operate than before (CIR 2000b).

The Relationship of Anthropology and the Law

In the eighteenth century, European intellectuals had treated laws as universal and easily identified in all societies (Nader 2002: 7-8). Nineteenth-century lawyer-anthropologists engaged in armchair work to postulate differences between Western and non-Western law. However, it was not until the twentieth century that actual ethnographic field studies became the norm for sociocultural anthropologists, who thereafter made significant progress in understanding the legal systems of particular societies worldwide (Nader 2002: 7-8). These field studies, pioneered during a period of rapid industrial expansion in the United States and rapid spread of European colonialism worldwide (Nader 2002: 7-8). People could be regulated and administered though law, and law was and is often a means of inventing culture (Nader 2002: 7-8). Culture as a form of control has become especially relevant to happenings in law (Nader 2002: 7-8).

Anthropologists are not concerned with what was the law, nor with lawyers' versions of what the law is ideally (as the courts see it), but with what actually goes on in people's minds (Derrett 1976:47). Anthropology is a series of tools and methods whose use does not necessarily recommend the appropriateness of one political or theoretical ideology rather than another (Cochrane 1976: 2).

In the 1960s, the possibility of anthropologists teaching in law schools would been anathema in most law schools. The relationships between anthropologists and lawyers might have been antagonistic, similar to "how dare you speak about the law when you are not a lawyer?" (Nader 2002: 1) Today there has been a crossing of

Rubicon and disciplines are blurring to the benefit of everyone. From the late 1960s to the mid-1990s, lawyers and anthropologists intersected frequently as the sheer numbers of both increased (Nader 2002:102). Some lawyers became anthropologists and some anthropologists became lawyers. But more often than before, academic lawyers moved away from technical law towards the impact of the law on everyday life, and in so doing practiced a kind of social science (Nader 2002: 7-8). No single minority group accounts for more than 4 percent of the lawyers in the United States (LSAC 2005a). According the American Bar Association, in 2006 there were 1,116, 967 lawyers in the United States (ABA 2006). I was unable to obtain the exact number of individuals aligning themselves professionally with the study of anthropology, however I feel comfortable to state that the number of practicing or academic anthropologists it is well below a million.

Social Science and the Law

The breadth and complexity of issues surrounding the Supreme Court's use of social science data in making its decisions stem from the clash of cultures of law and social science (Erickson and Simon 1998: 10). Central to this clash are differences in method and "epistemology that feed the ongoing debate over the validity, neutrality, and objectivity of social science data, and the role of statistics, certainty, and probability" (Erickson and Simon 1998: 5).

James B. McMillan, judge of the United States District Court, Western District of North Carolina, responded to the role of social science in the law: "social science...is entitled to a respected place in the halls of justice. The study of people and their problems is a natural prerequisite of the legal decision of problems among people" (McMillan 1794: 163). The extent to which that view is shared within the halls of justice or the social science academy is debated. On the flip side, case law exists where precedent is preferred to scientific data, and research is ignored in favor of history and morality (Erickson and Simon 1998: 10).

Lawyers and social scientists, similar to individuals from different national or linguistic cultures, may have such different professional customs and values that they cannot effectively communicate with each other (Tanford 1990: 156; Erickson and Simon 1998: 6). Among the significant differences are the following binary oppositions:

> "Science is rational, but the law is irrational. Law is specific while science is abstract. Law produces idiographic knowledge while science produces nomothetic knowledge. Legal findings are based on certainties and the

> absence of reasonable doubt but social science findings are based on probabilities and generalizations. The law is normative and prescriptive, describing how people should behave, and what ought to be. Social science attempts to be value-free, positive, and descriptive, describing how people so behave" (Driessen 1983; Lindman 1989; Monahan and Walker 1986; Tanford 1990; Erickson and Simon 1998).

Additionally, " the law is limited, a closed system, seeking a decision one way or the other while science is a continuous process...and therefore more of an open system" (MacHovec 1987: 52). Both science and the law seek the truth, but they do it by different means and for different ends (Erickson and Simon 1998: 10).

Science does not pretend to claim 100 percent accuracy or success with regard to the goal of seeking the truth, but it does attempt to be objective and to remain open to revision. The distinctive character of social science discourse is that every assertion, no matter how objective, has a divergent interpretation of the "factual" situation (Mannheim 1936: xv). Twentieth-century social scientists know that it is not impossible to succeed in conducting an absolutely value-free investigation, but that there is great value in a scientist's awareness of biases in both the selection of a problem and its ensuing investigation (Erickson and Simon 1998: 11).

An example of the court's inflexibility exists in the change that occurred over nearly six decades, from the time of *Plessy v. Ferguson* in 1896, to that of *Brown v. Board of Education* in 1954. If *Plessy* was a reflection of the Spencerian notion of racial immutability and the doctrine of the "survival of the fittest", then the court indeed acknowledged nineteenth-century social science at the time of the decision (Driessen 1983). By the mid-1920s, these "social facts' were no longer considered to

be true; but it was not until 1954 that the Court reversed itself in *Brown v. Board of Education* on the basis of new social data and in light of the effects of segregation (Driessen 1983). Not all social science data are equally valid or equally weighted. The legal community must make judgments that may or may not adhere to existing standards upheld by social scientists (Faigman 1989). In the years since Brown, there has been a change in scientific issues, databases, and methods used in the courts, and a change as well in the use of expert witnesses, briefs, and other methods introducing social science into court (Erickson and Simon 1998: 18).

The Law School Admission Process

It is useful to note the type of, amount, and source of information available to law schools about each candidate for admission. Law school candidates are responsible for ensuring that this information finds its way to the law schools they are applying. For example, every candidate must take the Law School Admissions Test (LSAT) and submit transcripts from all of his/her post-secondary academic work to the Law School Admissions Council (LSAC). The 2004-2005 LSAT exam rate was $115 and copies of transcripts ranged from $5 to $20 (Erickson fieldnotes: November 11, 2005). The LSAC then collects this information and transmits it to the law schools of the candidate's selection. To facilitate that process, schools require applicants to subscribe to the Law School Data Assembly Service (LSDAS), a unit of the LSAC. LSDAS assembles the candidate's package of information in a Law School Report, which is sent to the law schools. The Report includes the candidate's LSAT score(s), copies of the candidate's academic transcripts, a standardized analysis of the transcript, and copies of the letters written in support of the candidate's application (Shields 2002:736). A basic subscription to the LSDAS is $106 and includes one law school report (Erickson fieldnotes: November 11, 2005). The LSDAS prefers students to register and maintain their account electronically; otherwise students are provided with paper updates and correspondences quarterly (Erickson fieldnotes: June 20, 2005). Also it is my experience that most students apply to more than one school, adding an additional expense to the LSDAS subscription of $12 dollars for each additional law school (Erickson fieldnotes: November 11, 2005).

Some feel the report provides a remarkably complete package of information about each candidate; indeed, it is generally considered sufficient to permit a fair evaluation of the academic credentials of all candidates (Shields 2002: 736). I disagree that it provides a fair evaluation of the student's academic records. For example, if the student has obtained additional degrees or certifications above undergraduate level, they are not considered in the LSDAS report, and it is up to the individual universities to evaluate those degrees (Erickson fieldnotes: June 20, 2005).

Additionally, the cumulative GPA holds more weight than the degree-granting institution GPA degree on the Report. If the student attends several schools or experienced difficulties during the first few years of college, all GPAs are compiled and a "Cumulative Across GPA" is assigned to the student (Erickson fieldnotes: June 20, 2005). I do not feel this report accurately portrays a clear academic picture of the individual applying to law school. However, in addition to the report, nearly all schools require an application packet. The packet includes: information about the work history of the candidate (or resume), honors earned by the candidate, identification of extracurricular activities, and an essay or essays written by the candidate in support of his or her application (Shields 2002:737). The four Kansas City universities' application fees range from $40-$60 each (Erickson fieldnotes: November 11, 2004). A typical applicant file contains anywhere from ten to thirty pages of objective and subjective information to review.

The Universities (Demographics and Background Information)

The four law schools geographically closest to the Kansas City metropolitan area are: 1) University of Kansas; 2) Washburn University; 3) University of Missouri-Kansas City; and 4) University of Missouri-Columbia. All four universities are public universities founded between 1872 and 1903. The University of Kansas is located in Lawrence, Kansas approximately 46 miles from downtown Kansas City. The University of Missouri-Columbia is the farthest from downtown Kansas City at 154 miles, and the University of Missouri-Kansas City closest at 4 miles. Washburn University located in Topeka, Kansas, is 76 miles from downtown Kansas City. These calculations are based on a downtown Kansas City zip code of 64106.

Three of the four schools are regionally-ranked universities, and the University of Missouri-Kansas City is a nationally-ranked university. National universities typically attract students on a national and international scale; graduates typically gain employment nationally based on reputation, and nationally-ranked schools generally require higher LSAT scores and GPAs (University of Massachusetts Amberst 2005). Regional universities typically attract students from the local area that continue to reside in the area after graduation, offering strong local alumni networks (University of Massachusetts Amberst 2005). According to America's Best Graduate Schools 2006, The University of Missouri-Columbia is rated 69 of the top 100 schools, followed by the University of Kansas at 100 (U.S. News & World Report 2005). The University of Missouri-Kansas City and Washburn University are both Tier 3 school (U.S. News & World Report 2005). A Tier 3

school ranks mid-range, with a Tier 4 being the lowest ranking a university can receive.

Despite the differences between university ranking, and a regional vs. national reputation, the Kansas City schools are relativity similar in student LSAT and GPA results. For comparison, the top five law schools (Yale, Harvard, Stanford, Columbia, and New York University) are admitting students with LSAT scores of 166-175 and GPAs ranging 3.50-3.96 (U.S. News & World Report 2005). The LSAT is the standardized graduate exam that all law school applicants are required to complete before starting the application process. The exam used to apply to law school. The LSAT score is a three-digit number ranging from 120 to 180 determined by the number of correct answers on the four scored sections, generally covering a total of about 96-104 questions (LSAC 2005a). LSAT scores are not absolutes: a 180 does not necessarily mean that every question is answered correctly (an individual could have as many as 2-3 incorrect answers on the four scored sections and still have a score of 180), nor does a 120 necessarily mean someone answered every question incorrectly. Generally, the applicant will need approximately 15-17 correct answers before their score moves above a 120. Once the applicant reaches the 120 threshold, "each additional correct answer will help raise your score with, roughly speaking, about two points gained for every three additional correct answers" (Northeast Association of Pre-Law Advisors 2001).

Table 1: Law Student LSAT and GPA Scores					
	2003-2004			2004-2005	
	LSAT	**Undergrad GPA**		**LSAT**	**Undergrad GPA**
	(25^{th}/75^{th} percentile)			(25^{th}/75^{th} percentile)	
University of Kansas	154-160	3.22-3.76		153-160	3.28-3.80
University of Missouri-Columbia	156-160	3.23-3.76		157-161	3.22-3.72
University of Missouri-Kansas City	151-156	3.11-3.64		151-156	3.14-3.63
Washburn University	150-155	2.78-3.51		151-156	2.95-3.60
U.S. News & World Report (June 16, 2004, April 15, 2005)					

Financial Obligation and Scholarships

The financial expense associated with attending law school is great for most students. During the 2003-2004 academic year public in-state and out-state tuition for the four schools averaged as follows: KU $7,966/$15,351, MU $12,306/$23,590, UMKC $11,486/$22,003, and Washburn $9,814/$16,086. Tuition increased at KU, UMKC, and Washburn, while the University of Missouri-Columbia experienced a decrease of approximately $200 for in-state and $500 out-state students (U.S. News & World Report 2004, 2005; Washburn University 2005). The University of Kansas experienced the smallest tuition increase of $759 for in-state and $1,222 out-state (U.S. News & World Report 2004, 2005). UMKC rested in the middle with an increase of $1,856 for in-state students and $3,453 for out-state students (U.S. News & World Report 2004, 2005). Experiencing the greatest increase in tuition, Washburn University raised in-state tuition $2,028 and out-state tuition $3,500, resulting in the largest increase in the 2004-2005 academic year per year (U.S. News & World Report 2004, 2005).

The four area law schools do not encourage law students to work the first year, stating the "demands on new students are just too great. Students need to focus on school that first year and they will have plenty of time to work at the end of the second year or during their third year " (Erickson interview: June 22, 2005). The Washburn University law student body has 40 percent of the students attending school on merit or discretionary fund scholarships (Erickson interview: June 22, 2005).

It is my experience that the University of Missouri-Kansas City is the only school actively marketing minority scholarships or opportunities to students (Erickson fieldnotes: June 1, 2005). The University of Kansas mentions merit-based scholarships awarded on the "basis of academic achievement and student's potential for success in law school...Many are awarded to students who come from specific geographical regions or who are members of minority groups" (University of Kansas 2005c). It was extremely difficult to obtain information on minority scholarships awarded at all four schools.

Recruitment

So, why would people want to come to Kansas City? The question was posed by one minority attorney when told the four Kansas City law schools are experiencing recruitment and retention problems (Erickson interview: October 16, 2003). Some area attorneys feel Kansas City's reputation with segregation issues, such as *Brown vs. the Board of Education*, affects minority law student recruitment to the area, stating "the biggest challenge to recruiting and retention is the city itself, and we need to find a way to articulate why lawyers of color would want to live here, in Kansas City" (Erickson fieldnotes: August 12, 2003). Kansas City also has as internal struggle between attorneys licensed in Missouri and Kansas (Erickson fieldnotes: October 16, 2003). The states do not have reciprocity in bar licensure; to practice in either state you must pass the state's bar.

All four law schools use their web sites as major marketing tools. All material found in mail packets sent to prospective students can be found on the schools' web sites, plus volumes of more information. The marketing information among the four schools varies slightly, but all present basically the same information focusing on different aspects of the schools. All four school claim to have a strong alumni community and support system. The University of Kansas is selling their quality of student life and the community. MU is pushing technology and networking opportunities. UMKC is selling their small-town feeling in a big-city university. Washburn promotes the faculty diversity more than the other schools. In my opinion Washburn is making an active effort to use diversity as a key marketing tool.

The University of Kansas aggressively markets student life and the community. The web site of the University of Kansas has a section called "Why Choose KU?" listing:

> "KU Law is at the heart of a major university enabling law students to take advantage of a rich array of cultural, social, and athletic activities. KU Law is located in Lawrence, one of the most beautiful college towns in the country, with excellent schools, cultural resources, and opportunities and near Kansas City-Johnson County, a major metropolitan area" (University of Kansas 2005a).

The University of Kansas held two "Women in Law" forums during the 2004-2005 school year, one in the fall of 2004, and the other in February, spring semester, 2005. This is a new program at KU (Erickson fieldnotes: February 2, 2005). The purpose of the forum is to "educate women on various careers they may pursue with a law degree, discuss some of the challenges they may face while balancing a legal career and a family, and answer questions regarding the admissions process, financial aid, and scholarships" (Erickson fieldnotes: October 8, 2004; University of Kansas 2005b). KU also has a place on their web site to inquire about current recruiting events.

The University of Missouri-Columbia aggressively markets "John K. Hulston Hall and the 21st Century Technology" in both their mailed materials and web site (University of Missouri-Columbia 2005). The school promotes "state-of-the-art courtrooms, digital technology and videotaping equipment for students to practice oral argument skills" (MU 2005a). MU also hears state and federal cases in the Hulston Hall's university courtroom "offering first-hand experience for students to

watch the actual legal system in action" (MU 2005a). The promotional materials offer students opportunities to meet and network with lawyers and judges. I was unable to obtain a list of recruiting events and locations from MU. They strongly encouraged me to visit the campus each time I called for recruiting information. They do have four out-of-state LSAC sponsored recruiting events scheduled for 2005 posted on their web site in Washington DC, Chicago, Atlanta, and Houston (University of Missouri-Columbia 2005b).

The University of Missouri-Kansas City readily makes their recruiting schedule available on their web page. In 2003-2004 UMKC held 14 admissions recruiting events commencing September 10, 2003 and concluding March 24, 2005. Of the 14 events, none lasting more than one day, two of the events were held in the state of Kansas, eight in various Missouri locations all within a two hour drive time from downtown Kansas City, MO, and the remaining three were held out of state (University of Missouri-Kansas City 2003). The Kansas locations were held at KU and Washburn University. Out of state locations included: Birmingham, AL, Ames, IA, and Houston, TX.

Significant changes were made to the UMKC 2004-2005 recruiting schedule. There were 12 recruiting events total, two less than last year. Of the 12 events: three of the events lasted two full days, two events in the state of Kansas, three out of state events, and the remaining events in Missouri (University of Missouri-Kansas City 2005). The new out of state locations included: New York, NY, Chicago, IL, and Atlanta, GA. The Missouri locations changed to include St. Louis and Springfield,

MO. Both Missouri cities are larger and twice as far from downtown Kansas City. The Kansas events were held at KU and the Overland Park Convention Center. Washburn University was dropped from the 2004-2005 UMKC recruiting schedule.

UMKC provides a "Welcome to Kansas City Packet" available on their web page providing new students with everything a new or transferring student might want (University of Missouri-Kansas 2005). The packet includes housing information, financial aid, employment, city demographics, student organizations, and other information to vast to include. The packet is incredibly impressive. UMKC also encourages students to utilize the university's strong contacts with the Kansas City judicial and legal community and associations.

Washburn proudly markets their faculty in both mailed materials and on their web site. On the web page faculty members have individual web pages with photos, contact information (phone, physical office location, and email), education background and experiences, areas of practice, and awards received (Washburn University 2005a). According to U.S. News & World Report, Washburn has the lowest student to faculty ratio (U.S. News & World Report 2005). It would be difficult to quantify this information due to the inconsistencies based on the information available to the public on this point. Washburn also markets their connection to the state capital facilities, since they reside in the capital city of Kansas. Washburn also strongly encourages students to visit their campus for tours, or to speak with Assistant Director or Director of Admissions. In my experience all contact with the university via the phone was extremely pleasant and informative. Washburn

also holds regularly scheduled recruiting events on their campus, "Pre-Legal Education Workshops, allowing students to meet and discuss the advantages of obtaining your legal education at Washburn School of Law" (Washburn University 2005b).

MINK (Missouri, Iowa, Nebraska, and Kansas Consortium of Law Schools) held annually seems to be a very important event at all four schools. The event rotates locations, remaining within the mid-west area, attracting several universities, and drawing large numbers of prospective students, "giving students from all states an opportunity to meet and collect information on mid-west law schools on an annual basis" (Erickson fieldnotes, June 20, 2005). The next MINK event is scheduled for September 8, 2005, at the Overland Park Convention Center (Erickson fieldnotes, June 20, 2005).

Law Student Applications, Acceptance, and Enrollment

Most law school admissions committees attempt to balance their emphasis on cold, hard numbers with a good-faith effort to understand the minds of the thousands of applicants they assess (Princeton Review, The 2004). It may well be true that the law-school admissions process relies too heavily on such impersonal criteria as the LSAT, but thoughtful consideration is given by admissions committees to the sort of human beings they admit (Princeton Review, The 2004). Whether this approach is followed by the schools' admissions committees is debatable, since admissions is a closed procedure not subject to outside scrutiny.

The number of applicants accepted and enrolled is very different among the four schools. Table 2 displays admissions, acceptance, and enrollment data from the 2003-2004 school year for the four schools. Table 3 displays the same data for the 2004-2005 school year.

Table 2: 2003-2004 Student Applications, Acceptance, and Enrollment Information

	No. Applicants	No. Accepted	No. Enrolled	Acceptance Rate	% Enrolled of Applied	% Enrolled of Accepted
University of Kansas	1414	330	167	23.34%	11.81%	50.61%
University of Missouri-Columbia	1110	288	151	25.95%	13.60%	52.43%
University of Missouri-Kansas City	1001	411	149	41.06%	14.89%	36.25%
Washburn University	1010	361	173	35.74%	17.13%	47.92%

U. S. News & World Report (June 16, 2004)

In 2003-2004, the University of Missouri-Kansas City had the fewest applicants, the most accepted, and the fewest enrolled of the four schools. Washburn accepted the second-fewest number of applicants, had the second-most accepted, and enrolled the most students. The University of Missouri-Columbia and the University of Kansas had very similar percentages of applicants accepted and enrolled. The University of Kansas had the most applicants.

Table 3: 2004-2005 Student Applications, Acceptance, and Enrollment Information

	No. Applicants	No. Accepted	No. Enrolled	Acceptance Rate	% Enrolled of Applied	% Enrolled of Accepted
University of Kansas	1238	313	167	25.28%	13.49%	53.35%
University of Missouri-Columbia	1058	319	145	30.15%	13.71%	45.45%
University of Missouri-Kansas City	971	447	197	46.04%	20.29%	44.07%
Washburn University	1172	370	157	31.57%	13.40%	42.43%

U.S. News & World Report (April 15, 2005)

On the national level law school applicants are increasing. However, in the 2004-2005 school, of the four schools, only Washburn had applicants increase. All of the four schools except the University of Kansas increased their applicants accepted. The University of Kansas and the University of Missouri-Columbia enrolled a similar number of students for 2004-2005 as the previous year. However, the University of Missouri-Kansas City accepted more students than the previous year, while Washburn University enrolled fewer students.

From my experience it seems most students submitting an application to one of the four schools submit applications to the other four schools. Acceptance rates seem to indicate that the most preferred school is the University of Kansas, followed by the University of Missouri-Columbia, Washburn University, and the University of Missouri-Kansas City. The University of Missouri-Columbia 2003 applicant pool was made up of 84 percent Missouri residents and 38 percent Missouri graduates

(University of Missouri-Columbia 2004). In 2004, 80 percent of the applicants were Missouri residents and 29 percent Missouri graduates (University of Missouri-Columbia 2005). I was unable to obtain this information from the three other schools.

Law School Enrollment Full Time by Gender

Women have increasingly started applying to law school over the last 57 years. In 1947, a meager 1,405 female students enrolled in 111 ABA approved law schools (ABA 2005e). That number has grown to a reported 67,027 females enrolled in law school in 2003 at 188 ABA approved schools (ABA 2005d). The American Bar Association reported a 0.6 percent increase in 2004 to 67,438 female students enrolled in 2004 (ABA 2005d). Males also experienced an increase in law student enrollment during the years of 2003-2004. In 2004, 72,938 males enrolled in law school increasing from 70,649 in 2003 (ABA 2005d). I was unable to obtain total male enrollment from 1947 to 2002.

A Western District Court Judge shared one of his memories of when Supreme Court Justice Sandra O'Connor joined the bench during the Reagan administration,

> "she was seventh in her class graduating from Stanford Law School. When she applied for positions as a new graduate attorney, the only jobs that were offered were of a secretarial nature. This frustrated and angered her as an attorney and a woman. The perception of many was that women would make terrible attorneys, because they are too emotional" (Erickson interview: October 17, 2003).

During the 2003-2004 academic school year, female enrollment at KU surpassed male enrollment by 102 students. Table 4 shows 2003-2004 enrollment by gender at the four schools.

Table 4: 2003-2004 Full Time Enrollment (only) by Gender

	Total No.	% Female	No. Female	% Male	No. Male
University of Kansas	550	59.3%	326	40.7%	224
University of Missouri-Columbia	488	39.5%	193	60.5%	295
University of Missouri-Kansas City	464	48.5%	225	51.5%	239
Washburn University	473	45.0%	213	55.0%	260

U. S. News & World Report (June 16, 2004)

Of the four schools the University of Missouri-Columbia enrolled the lowest percentage female applicants. The University of Kansas enrolled the highest percentage of female applicants. About 60% of the enrolled law students at the University of Kansas are female; there were obviously more female law students in my experience on campus. The remaining two schools appear balanced in gender.

Table 5: 2004-2005 Full Time Enrollment (only) by Gender

	Total No.	% Female	No. Female	% Male	No. Male
University of Kansas	524	44.3%	232	55.7%	292
University of Missouri-Columbia	435	39.3%	171	60.7%	264
University of Missouri-Kansas City	487	47.4%	231	52.6%	256
Washburn University	462	44.6%	206	55.4%	256

U.S. News & World Report (April 15, 2005)

In 2004-2005 Washburn and the University of Kansas decreased their fraction of female students. For the University of Missouri-Columbia, while the percentage of female students remained about the same, the number of female students enrolled

declined. The University of Missouri-Kansas City had the same percentage of female students enrolled as in the previous year, but the number enrolled increased.

Race as a Social Construction

Race cannot be a static concept; races have changed and race has evolved, but race will not disappear (Nepaulsingh 2000:142). We are unable to clearly define it, so how do we know what it is?

According to Jeffrey Lehman of the University of Michigan Law School, "the fact is that society today is not a race-neutral society. It's not a color-blind society and, therefore, in order to have a racially integrated student body, it is necessary to pay attention to race in the admissions process" (Brackett 2001). A central issue in considering race in admission procedures is that "the implicit definition of what makes a person a member of a particular race differs from region to region across the globe" (Bamshad and Olson 2003). Race is a social construction shaped by different social and political perspectives, which affect how we relate to each other (Randall 2002).

There is no single concept of race. Rather, race is a complex concept, best viewed for social science purposes as a subjective social construct based on observed or ascribed characteristics that have acquired socially significant meaning (National Research Council of the National Academies 2004: 2). In fact there is little consensus on what race actually means. In the United States, the way in which different populations think about their own and other's racial status have changed over time in response to changing patterns of immigration, changing social and economic situations, changing societal norms, and government policies (National Research Council of the National Academies 2004: 2).

In the 21st century, I think it is enormously important that we remember that race is a human creation; that it has a past, and that same past influences the present, and understanding that past is essential to plan for the future (PBS Online 2005). Thinking about the past, "the U.S. Constitution, written in 1787, requires a census every 10 years to determine the number of people living in each of the states. The requirement for data on race grew out of the struggle in the Constitutional Convention over the distribution of power between the North and the South" (National Research Council of the National Academies 2004: 206). Because most of the country's slave population lived in southern colonies, possible ways to balance the sectional power were looked into by various organizations while others claim it was merely a masked exercise of new power and prestige (National Research Council of the National Academies 2004: 206).

Ethnic and Racial Classifications

The way we count and organize people has changed over the last 215 years, and I expect it to continue to changing into the future. In 1790, the racial categories available were: Free Whites, Other Free Persons, and Slaves. In 1890 the categories included White, Black, Mulatto, Quadroom, Octroom, Chinese, Japanese, and Indian (National Research Council of the National Academies 2004: 31). The ambiguity involved in defining race, or racialization, has implication for how race data are collected (Bell 2000: 2). The official federal government standards for data on race and ethnicity currently identify five major racial groups (black or African American, American Indian or Alaskan Native, Asian, Native Hawaiian or other Pacific Islander,

and white) and two ethnic groups (Hispanic or Latino and Not Hispanic or Latino) that may be of any race (National Research Council of the National Academies 2004: 31).

Racial and ethnic classifications are also unreliable and unstable over time. Individuals cannot reliably be "raced," partly because the criteria are so subjective (Mukhopahhyay and Henze 2003:672). Also government standards are not always consistent with scholarly concepts of race, or with concepts held by individuals and groups. As a result, it may be difficult to obtain data on race and ethnicity that are comparable over time or across different surveys and administrative records (National Research Council of the National Academies 2004: 2). The impossibility, until recently, of selecting more than one racial or ethnic category implicitly stigmatizes multiracial individuals (Mukhopahhyay and Henze 2003:675). And the term "mixed" wrongly implies that there are such things as "pure" races, an ideology with no basis in science (Mukhopahhyay and Henze 2003:675). Prior to 1970, there was no nationwide standard for identifying people of Latin American origin (U.S. Census 2005). The US government needed a way to count the ever increasing number of Spanish speaking peoples. In 1970 the US Census included a Hispanic origin item asking respondents to indicate a specific subgroup (US Census 2005). The recent expansion of the number of the 2000 U.S. Census categories still cannot accommodate the diversity of the U.S. population, which includes people whose ancestry ranges from Egypt, Brazil, Sri Lanka, Ghana, and the Dominican Republic to Iceland and Korea (ibid).

Macroracial categories are dangerous in that the categories oversimplify and mask complex human differences. Saying that someone is Asian tells us virtually nothing concrete, but it brings with it a host of stereotypes, such as "model minority," "quiet," "good at math," "inscrutable," and so on (Mukhopahhyay and Henze 2003:675). Yet the Asian label includes a wide range of groups, such as Koreans, Filipinos, and Vietnamese, with distinct histories and languages (Mukhopahhyay and Henze 2003:675). The same is true for "white," a term that homogenizes the multiple nationalities, languages, and cultures that constitute Europe (ibid). The label "African American" ignores the enormous linguistic, physical, and cultural diversity of the peoples of Africa (ibid). The term "black" conflates people of African descent who were brought to the United States as slaves with recent immigrants from Africa and the Caribbean (Mukhopahhyay and Henze 2003:671).

These macroracial labels oversimplify and reduce human diversity to four or five giant groups. Apart from being bad policy and admission design, these categories do not predict anything helpful—yet they have acquired a life of their own (Mukhopahhyay and Henze 2003:675). Macroracial categories, such as those used in the U.S. Census and other institutional data-collection efforts, force people to use labels that may not represent their own self-identity or classifying system (ibid). They must either select an existing category or select "other"—by definition, a kind of nonidentity. Knowing someone's racial or ethnic label does not necessarily tell you anything else about the person.

Ethnic and Racial Categories on Law School Applications

Minority status is reported by the student. Law schools consider a student's ethnic or racial status to be whatever the student indicates on his LSAT registration form (LSAC 2005). Minority status alone is not a guarantee of admission, but it simply helps the admissions committees form a more complete picture of the student (LSAC 2005b). More important to admissions committees than minority status is how minority status has affected the student's life and what disadvantages he may have overcome (LSAC 2005b).

The Law School Admissions Council reported that students occasionally ask about the negative implications of reporting ones minority status, or if it is better not to report any race or ethnicity on application materials (LSAC 2005c). There seems to be a troubling perception that some law schools do not admit "students of color", or that the only chance for a minority student to gain admission is to avoid completing the race or ethnicity section of the application (LSAC 2005c). Not every law school will ask for race or ethnicity on its application forms, but that should not be taken as an indication that one is not wanted (LSAC 2005c). Just because race is not asked, or because that part of the form that indicates race may not be seen by all who review the applications, it is imperative that race be included in a student's personal statement showing just how significant racial identity has been for the student (LSAC 2005c). Law schools want a motivated and diverse student body.

Law schools rich in racial and ethnic diversity are thought to offer students a "chance to encounter ideas and experiences different from their own, which can be

good practice for the life of a lawyer" (U.S. News & World Report 2005). Diversity representation in law schools is a requirement for meeting the accreditation standards of the American Bar Association (ABA) and the membership guidelines of the Association of the American Law Schools (AALS) (ABA 2005; AALS 2005). Most ranked law schools have some kind of Diversity Index. The diversity index is based on the total proportion of minority students, not including international students (U.S. News & World Report 2005).

Table 6 displays law school application categories for racial and ethnic information during the 2003-2004 and 2004-2005 academic years at the four schools. There were no changes to the categories between the two years. The four universities present the categories differently. University of Missouri-Columbia and the University of Kansas offer applicants six categories from which to choose, Washburn University offers nine, and the University of Missouri-Kansas City presents 10 categories for applicants to select.

Table 6: 2003-2004 and 2004-2005 Law School Admissions Application Ethnic or Racial Categories

University of Kansas
Optional: Ethnic group: please check one or more as applicable.

- American Indian (Tribal Affiliation :_____)
- Asian or Pacific Islander
- Black, African American
- Hispanic
- Multiracial
- White

University of Missouri-Columbia
Because the law school is required to report statistical data on applications and students, we would greatly appreciate your providing the following optional information. Thank you for your assistance. *(As stated on the application, no other direction provided to the applicant).*

- Asian or Pacific Islander
- Black non-Hispanic
- Hispanic
- Native American/Alaskan Native (Tribe____)
- Other _____
- White non-Hispanic

University of Missouri-Kansas City
Ethnic Origin (optional)

- African-American
- Alaskan Native
- American Indian (tribe____)
- Asian
- Hispanic-American
- Mexican-American
- Nonresident Alien
- Pacific Islander
- Puerto Rican
- White

Washburn University

We are asked for ethnic information on various statistical reports. If you choose to do so, please identify your ethnic background. If applicable, you may check more than one category.

- American Indian, Alaskan Native
- Asian, Pacific Islander
- Black, African-American
- Canadian Aboriginal
- Caucasian, White
- Chicano, Mexican-American
- Hispanic, Latino
- Other, Specify_____
- Puerto Rican

University of Kansas, University of Missouri-Columbia, University of Missouri-Kansas City, and Washburn University (2003-2004 and 2004-2005 mailed application materials)

KU is the only university that offers a multiracial category. MU and Washburn both offer the category "Other", while UMKC does not offer a category to students falling outside of the predominate categories. UMKC is the only school that separates Pacific Islander from Asian; the other three universities combine the two. UMKC has a category of Non-Resident Alien, which I assume is for international students not intending to remain in the United States permanently after graduation.

Washburn and KU combine African American and Black into one category. UMKC provides only African American, and no Black. MU lists Black non-Hispanic as a category, leaving off African American entirely. KU does not list Alaskan Native among their categories. MU and Washburn combine American Indian and Alaskan Native into one category. UMKC makes the distinction between the two, listing them separately.

The greatest difference among the categories on all four applications is the use of the term Hispanic. KU offers an independent category of Hispanic. MU offers Black non-Hispanic, Hispanic, and White non-Hispanic. UMKC lists Hispanic-American alone. Washburn combines Hispanic with Latino, including one additional category for Chicano with Mexican American, whereas UMKC also offers Mexican-American as a stand alone category.

A problem with the existing categories at all four law schools is the categories which are available for a American tracing his ancestry to the country of India. Would it be correct to select the category Asian since it is geographically closest region, despite the vastly different culture, customs, and language? The categories available for selection

determine the outcome, so changing the categories will dramatically affect the results. Washburn provides the most choices to applicants, possibly resulting in a more accurate portrayal of the student body. KU and MU offer a limited number of categories, reducing the precision of measurement.

Table 7: 2003 -2004 Full Time Enrollment (only) by Race & Ethnicity

University Name	Total No.	African-American	American Indian	Asian-American	Mexican-American	Puerto Rican	Other Hispanic-American	White	International	Unknown	Total Percentages
Law Students by percentage											
University of Kansas	550	4.5%	2.5%	3.5%	6.4%	0.0%	0.0%	76.7%	1.6%	4.7%	99.9%
University of Missouri-Columbia	488	4.7%	1.2%	2.7%	0.0%	0.0%	0.8%	86.9%	0.0%	3.7%	100.0%
University of Missouri-Kansas City	464	2.6%	1.6%	3.6%	0.8%	0.4%	0.4%	90.6%	0.4%	0.0%	100.4%
Washburn University	473	4.4%	1.7%	3.2%	1.7%	0.2%	1.1%	86.3%	1.5%	0.0%	100.1%
Law Students by actual number											
University of Kansas	550	25	14	19	35	0	0	422	9	26	550
University of Missouri-Columbia	488	23	6	13	0	0	4	424	0	18	488
University of Missouri-Kansas City	464	12	7	17	4	2	2	419	2	0	465
Washburn University	473	21	8	15	8	1	5	408	7	0	473

U.S. News & World Report (June 16, 2004)

Table 8: 2004-2005 Full Time Enrollment (only) by Race & Ethnicity

University Name	Total No.	African-American	American Indian	Asian-American	Mexican-American	Puerto Rican	Other Hispanic-American	White	International	Unknown	Total Percentage
Law Students by percentage											
University of Kansas	524	4.2%	2.3%	6.9%	0.0%	0.0%	8.0%	74.0%	0.0%	4.6%	100.0%
University of Missouri-Columbia	435	5.5%	0.9%	2.5%	0.0%	0.0%	0.9%	86.3%	0.0%	3.9%	100.0%
University of Missouri-Kansas City	487	2.87%	0.62%	2.87%	0.82%	0.00%	0.62%	91.99%	0.21%	0.00%	100.0%
Washburn University	462	4.55%	1.95%	2.81%	1.95%	0.22%	1.30%	83.33%	1.30%	2.60%	100.01%
Law Students by actual number											
University of Kansas	524	22	12	36	0	0	42	388	0	24	524
University of Missouri-Columbia	435	24	4	11	0	0	4	375	0	17	435
University of Missouri-Kansas City	487	14	3	14	4	0	3	448	1	0	487
Washburn University	462	21	9	13	9	1	6	385	6	12	462
Note: UMKC original data below. Data inconsistency forced me to adjust as shown above.											
		2.8%	0.6%	2.8%	0.8%	0.0%	0.6%	92.2%	0.2%	0.0%	100.0%
Note: Washburn original data below. Data inconsistency forced me to adjust as shown above.											
		4.5%	1.9%	2.8%	1.9%	0.2%	1.3%	83.3%	1.3%	2.6%	99.8%

U.S. News & World Report (April 15, 2005)

Table 7 displays 2003-2004 full-time enrollment by race and ethnicity. Table 8 displays the same data for the 2004-2005 school year. At all four schools the number of White students dominates the student body. The ratios of White law students to the Total Student Population are: KU 422/550, MU 424/488, UMKC 419/464, and Washburn 408/473.

Looking at the categories on Table 7 other than White for all four schools reveals interesting information on the structure of the four law schools. Cut's largest minority population is Mexican-American students at 35 students, but the KU application does not include this in their available categories for selection on the application. The second largest student body group is Unknown at 26, which could be anyone, including students not selecting a category. The third group is African-American at 25 students. MU's largest minority population is African-American 23 students, but again the application did not include this category for selection, instead offering Black non-Hispanic. The second largest group is 18 Unknown, and the third Asian-American at 13. UMKC's largest minority study body is Asian American at 17, which is listed on the application as category Asian. The second largest group is African-American at 12, followed by American Indian at 7. Finally, Washburn's largest minority group is 15 African-American students. The remaining study body groups include: 13 Asian-American students, and 8 American-Indian and Mexican-American students.

According to the information listed on U.S. News & World report, KU did not list any Puerto Rican students or other Hispanic-American students. MU reported zero Mexican-American, Puerto Rican, and International students. UMKC and Washburn both claim the only category marked as zero is Unknown students. I find it difficult to believe that all students selected a predetermined category especially at two universities listing different categories available for selection on their applications. The category Asian-American used on U.S. News & World Report is not available for selection on any of the applications, instead listed only as Asian.

I would bet that all four schools report data to U. S. News & World Report. U. S. News's report is viewed by thousands of students each year that are choosing a place to attend college or at least checks out the prospects and school demographics. I do not know how much the data actually weights the decisions of students, but they surely are looking. KU mentioned their listing in the Lawrence paper showing their pride with their ranking. Therefore surely universities look at it too and do there best to keep it updated or at least report (possibly biased information) to U. S. News & World Report on an annual basis. A comment made by UMKC only validates my thoughts, that if they took the time to tell me the report was wrong, they knew it was out there listed wrong too, and also their information changed during 2004-2005 year (Erickson fieldnotes: June 10, 2004). Someone had to change that information. I would also tend to believe that they care at least to some extent about the U.S. News and World Report Best Graduate Schools, Best Colleges, Best E-Learning Ranking

system. I'm not aware of any other information that is readily available to the general public or as widely used. There is a place called the *TheCenter* that does ranking as well. It is a private organization. This is a different kind of ranking system, producing different kinds of things, like amount of money available for research, faculty merits, degrees awarded for PhD, and Post Doc stuff.

It is important to note that I doubt the data listed on U.S. News & World Reports is 100 percent accurate, since I was unable to verify the information listed within the tables at any of the four schools. This kind of information is not readily available to the general public, especially, since the 2003 Michigan Law School rulings and fear of being questioned on whether or not quotas are being used.

The information in Table 8 was adjusted to compensate for inconsistencies in the data. Again, the data was unable to be verified by the law schools, and the student body information did not match the categories available for selection on the law school applications. The number of White students compared to the total student body varied slightly remaining by far the majority of the students.

KU's student body experienced one mentionable change. During the 2003-2004 school years, KU listed zero Other-Hispanic Americans and 35 Mexican-American students. In 2004-2005, they listed zero Mexican-American Students and 42 Other-Hispanic-American student. MU's minority student body remained relatively the same with African-American, Unknown, and Asian-American as the three largest student groups. UMKC added African-American to the top minority

student body category along side Asian-American at 14 students, including four Mexican-American students, and three American Indians. Overall UMKC did not show any major changes. The top two categories at Washburn remained African-American and Asian-American with 21 and 13 students. Additionally, Washburn did not report any of the categories as zero.

Retention

In July, 2000, The American Bar Association produced a resource guide for Programs to Advance Racial and Ethnic Diversity in the Legal Profession detailing 6 goals of the association (ABA 2005b: 5). Of the six goals, goals #2 and #3 are vital to successfully producing minority lawyers. Goal #2 says, "Ensure that minority students are adequately prepared to pursue a legal career" (ABA 2005b: 25). The ABA states,

> "Studies show that early intervention programs increase the chances that at-risk students will go on to receive higher education. Goal 2 programs capture students as early as pre-K, elementary and secondary school to address barriers to academic success before at-risk student become disenchanted and fall victim to negative societal influences. Later stage intervention programs focus on high school and undergraduate students. These programs encourage students to purse a legal career by familiarizing them with and getting them excited about the legal profession. Goal 2 programs should include internships, externships, special education programs, and mentoring and mock-trial programs" (ABA 2005b: 25).

Goal #3 is to "increase the number of minority students who attend and graduate from law school" by encouraging "internships, minority scholarships, and mentoring and study skills programs to help undergraduates prepare for law school" (ABA 2005b: 35). I was unable to find any university-sponsored recruitment and retention programs aimed at minority high-school students in the four law schools. However, the Kansas City Metropolitan Bar Association does sponsor a Summer Law Internship Program, SLIP, aimed at providing students exhibiting an interest in a legal career with first-hand, positive experience with the legal profession. I was unable to

find programs focusing directly on retention programs in the four Kansas City law schools. They might exist, but not be available for critique. The KCMBA is in the process of focusing its efforts on increasing minority clerkships and employment opportunities for existing law students in Kansas City (Erickson fieldnotes: May 10, 2005). If more minority employment is available, possibly more minority mentors will be available for future law students (Erickson fieldnotes: May 10, 2005). Within the universities, the majority of the efforts regarding minority retention were in the early stages of planning. However, all four universities are currently represented on various local association committees working to recruit and retain minority students (Erickson fieldnotes: May 10, 2005).

UMKC focused its interest on the retention problems associated with its higher nontraditional student population. This Bar Pass initiative did not focus solely on minority students. Professor Edwin Hood commented on the success of UMKC's recent Bar Pass initiative,

> "The talent of our law students was never in question, but it was clear from previous results they were having difficulty focusing." Part of that difficulty, he believes, is because UMKC attracts far more nontraditional law students than other Missouri law schools. "It's harder to study sufficiently and to really focus when you are older, have family responsibilities, a few children and possibly working a part-time job"(Rose 2003: 8).

Attrition

Table 9 displays 2002-2003 Attrition Rate for Full and Part-time Students. Table 10 presents the same data for the 2003-2004 school year. Enrollment and application information for 2002-2003 was not available, despite several attempts at obtaining the information. Based on what is available for analysis, the first year is when most withdrawals from law school occur. In 2002-2003, KU reported the lowest withdrawal rate of all four schools. MU, UMKC, and Washburn rates were comparable percentages of each other withdrawal rates. It is important to note that KU, MU, and Washburn do not have Part time programs. UMKC is the only school with a part-time program and it is offered during the day school only. The UMKC part-time program is basically the same as the full-time program; students take fewer classes and are expected to finish in 5 years verses 3 years. During 2002-2003, the percentage of male and female students withdrawing from KU law school was similar. MU, UMKC, and Washburn lost more female students then males.

Table 9: 2002-2003 Attrition Rates for Full-and Part-time Students
Percentages of Students Discontinuing Law School

	1st year	2nd year	3rd year	4th year	Men	Women
University of Kansas	5.6%	1.1%	n/a	n/a	2.3%	2.6%
University of Missouri-Columbia	9.1%	1.7%	n/a	n/a	2.8%	4.0%
University of Missouri-Kansas City	10.7%	3.6%	n/a	n/a	4.6%	6.1%
Washburn University	11.3%	4.1%	1.7%	n/a	4.9%	8.3%

U.S. News & World Report (June 16, 2004)

During 2003-2004, again all four universities lost the largest number of students during the first year. MU and Washburn lost slightly more than 6 percent of their student body during the second year. All four schools in 2003-2004 reported more male students than female students withdrawing from law school.

Table 10: 2003-2004 Attrition Rates for Full-and Part-time Students
Percentages and Actual Numbers of Law Students Discontinuing Law School

	1st year	2nd year	3rd year	4th year	Male	Female
University of Kansas	4.3%	n/a	n/a	n/a	2.1%	n/a
University of Missouri-Columbia	6.4%	6.2%	0.5%	n/a	4.4%	3.6%
University of Missouri-Kansas City	13.3%	1.1%	n/a	n/a	5.4%	3.8%
Washburn University	8.5%	6.6%	2.1%	n/a	6.9%	4.7%

	No. 1st year Students	No. 1st years Discontinuing	No. Males Discontinuing	No. Females Discontinuing
University of Kansas	167	7	5	n/a
University of Missouri-Columbia	151	10	13	7
University of Missouri-Kansas City	149	20	13	9
Washburn University	173	15	18	10

U.S. News & World Report (April 15, 2005)

Recommendations and Considerations

Critical to Sandra Day O'Connor's majority opinion was the many "friend of the court" briefs that poured in to support Michigan's case. Justice O'Connor noted in her opinion, she relied on "reports" as well as "numerous studies" cited in the briefs that show "student body diversity promotes learning outcomes" (Baker 2003: 9). She directly quoted a brief prepared by the American Educational Research Association (AERA); explaining how a diverse student body "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals" (Baker 2003: 9).

Clearly it was the idea that "diversity makes productive citizens" that made affirmative action a compelling state interest and not that it enhances learning and enriches students' understanding of the world (Baker 2003: 9). Compared to the briefs compiled by scholars, O'Connor gave more weight to briefs submitted by 3M, IBM, General Motors, and a group of retired military officers, all of whom supported the law school's policies and the need for affirmative action (Baker 2003:9). Nevertheless, the range of social science research in the briefs was compelling and gave her argument legitimacy and authority (Baker 2003: 9). Sadly, anthropological research was absent from the dozens of books, reports and articles that bolstered briefs submitted by the American Sociological Association (ASA), the American Psychological Association (APA) and American Educational Research Association (AERA) (Baker 2003: 9).

The American Anthropological Association, the Educational Testing Service, American Association of University Professors, American Association of University Women, the United Negro College Fund, and 50 other influential higher education associations aligned themselves with the influential AERE brief (Baker 2003: 9). Anthropology was, however, the only organization representing a field of knowledge or a discipline (Baker 2003: 9). Again, the research that supported the AERA brief was void of ethnographic methods (Baker 2003: 9).

An integral part of the admissions process of selective schools is reaching a 'critical mass' of underrepresented students of color (Baker 2003: 9). Justice O'Connor was vague and explained that a critical mass was simply "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," but she emphasized that "the Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota" (Baker 2003: 9).

Chief Justice Rhenquist, along with Associate Justices Scalia, Kennedy, and Thomas balked and hammered on this one point (Baker 2003:9). Scalia called "the University of Michigan Law School's mystical 'critical mass' [a] justification for its discrimination by race," and Rhenquist argued that "stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing" (Baker 2003: 9). Scalia went so far as to invite more lawsuits, suggesting that "some future lawsuits will presumably focus on whether the discriminatory scheme in question…has so zealously pursued its 'critical mass' as to make it an

unconstitutional de facto quota system, rather than merely 'a permissible goal'"(Baker 2003: 9).

Sooner than later, lawsuits will be filed probing this very issue and anthropological theory and ethnographic methods are well suited to explore this issue (Baker 2003: 9). The dissenting Justices were hell-bent on quantifying a "critical mass," I feel the field of anthropology is well positioned to offer research and analysis that can qualify or understand what is a "critical mass" and does it exist (Baker 2003: 9).

Clearly Anthropologists do not have all the answers or all the research, but working as part of a team helping to qualify and explore what a critical mass looks like is an issue that Anthropologists are well equipment to contribute to in the future. At the time the briefs were submitted Anthropology did not offer much in terms of support but moving forward it is not to late.

Anthropologist, Peter Wood, said it best when he called the Court's decision "foolish and will likely to lead to very unhappy consequences for higher education and the nation as a whole (Woods 2003:8). American colleges and universities have already embraced the "diversity" doctrine in admissions and curricula, however, the immediate effects in higher education "will probably be limited to a scramble in order to meet the cosmetic requirements set down by the Court: racial quotas have to be phrased in the obfuscating idiom of "critical masses," and admissions offices at large universities will have to set up a façade of giving "wholistic" consideration to each of many thousands of individual applications rather than automatically adding points to

the applications of minority candidates" (Woods 2003:8). These are, however, minor procedural matters in a much larger problem. The essential point is that American higher education is free to do openly what it has been doing in semi-secrecy for a long time, which is to reify the folk categories of racial and ethnic division in the US (Woods 2003:8).

Anthropology was not always complicit in this ideology (Woods 2003:8). The anthropology that came to life in the first decades of the 19th century in association with the anti-slavery movement in Britain fought and won a tremendously important intellectual battle against the "polygenesists" who ascribed separate origins and contrasting natures to the world's "races"(Woods 2003:8) . By the early 20th century, Franz Boas' deep skepticism about the significance of "race" gave American anthropology a long lasting anti-racialist spirit (Woods 2003:8). Anthropologists were the first to develop compelling theories about the symbolic construction and mutability of ethnic boundaries (Woods 2003:8).

Nor have anthropologists exactly abandoned this 200-year history of scientific recognition of the underlying unity of our species and the relative arbitrariness of ethnic divisions within social hierarchies (Woods 2003:8). But with a kind of intellectual jujitsu, we have theorized ourselves into a perfect inversion of anthropology's basic insight (Woods 2003:8). We still uphold the idea that humans are a single species, but now think that it is just and good to turn minor sub-cultural differences into a system of social privilege (Woods 2003:8). We still think race is

arbitrary and socially constructed, but now we also think that we can harmlessly deploy it to compensate for past and present social ills (Woods 2003:8).

Anthropologist Peter Woods goes on to say, "the diversity doctrine endorsed by the US Supreme Court in June of this year has nothing to do with a deconstructed theory of culture (Woods 2003:8). It is based on a view of "blacks," "Hispanics," and "Native Americans" as meaningful, unified and enduring categories (Wood 2003: 8). By embracing these categories, "the wealthy African-American physician's daughter, by the Court's theory, is every bit as much a rightful recipient of racial privilege in college admissions as an impoverished son of a black hospital orderly from the inner city—and much more so that the impoverished daughter of a white coal miner in Appalachia" (Woods 2003:8).

The AAA, by signing on to the American Council on Education's (ACE) amicus brief in the Michigan cases, helped to turn this collective folly into Constitutional law (Woods 2003:8). We now stand as a profession officially in favor of classifying people by race and distributing social goods according to a hierarchy of group victimization (Woods 2003:8). By having done so, we have betrayed 200 years of public advocacy of enlightened laws and theoretical insight into the human condition (Woods 2003:8). We should not have signed on to brief, but instead as a discipline and body of knowledge we should have stood up together and stated how we felt and why we felt that way.

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